



BRB No. 15-0010 BLA
Case No. 2012-BLA-05813

SHELBY M. CLISSO)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: <u>June 17, 2016</u>
)	
ELRO COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	ORDER on
)	RECONSIDERATION EN
Party-in-Interest)	BANC ¹

Employer has filed a timely motion for reconsideration en banc of the Board's September 30, 2015 Order awarding claimant's counsel a fee of \$300 for one hour of attorney services for the defense of his fee petition. 33 U.S.C. §921(b)(5); 30 U.S.C. §932(a); 20 C.F.R. §802.407(a), (b). Claimant opposes employer's motion. Employer has filed a brief in reply to claimant's opposition.

Employer seeks reconsideration of the Board's rejection of its contention that the Supreme Court's decision in *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. ___, 135 S. Ct. 2158 (2015) does not apply in this case to preclude counsel's entitlement to an

¹ Administrative Appeals Judge Ryan Gilligan has recused himself from this matter.

attorney's fee for defending his fee petition. We reject employer's contention that the Board incorrectly found *Baker Botts* inapplicable to a fee awarded pursuant to Section 28(a) of the Longshore Act, 33 U.S.C. §928(a), as incorporated by the Black Lung Benefits Act, 30 U.S.C. §932(a).

The issue presented in *Baker Botts* was whether Section 330(a)(1) of the Bankruptcy Code, 11 U.S.C. §330(a)(1), allows a bankruptcy court to award an attorney's fee for work performed in defending a fee application. Section 327(a) of the Bankruptcy Code, 11 U.S.C. §327(a), allows a bankruptcy trustee to hire attorneys, accountants and other professionals to represent or assist the trustee in carrying out his duties. The compensation for a professional person employed under Section 327(a) is governed by Section 330(a), which provides that a bankruptcy court may award to such professional person "reasonable compensation for actual, necessary services rendered by the . . . professional person, or attorney" to the estate. 11 U.S.C. §330(a)(1); *see Baker Botts*, 135 S. Ct. at 2164-65. The Supreme Court held that Section 330(a)(1) does not permit a bankruptcy court to award fees for defending a fee application because such activity is not "service to the estate." *Baker Botts*, 135 S.Ct. at 2163-69. The Supreme Court stated that it "will not deviate from the American Rule absent explicit statutory authority,"² *id.* at 2164 (internal quotation marks and citations omitted), and has "recognized departures from the American Rule only in specific and explicit provisions for the allowance of attorneys' fees under selected statutes." *Id.*³ (internal quotation marks and citation omitted).

Section 28(a) of the Longshore Act, pursuant to which attorney's fees are awarded under the Black Lung Benefits Act, *see E. Associated Coal Corp. v. Director, OWCP [Gosnell]*, 724 F.3d 561, 25 BLR 2-359 (4th Cir. 2013); 30 U.S.C. §932(a), has long been recognized as a fee-shifting statute, and thus an exception to the American Rule that litigants pay their own attorney's fees.⁴ *Gosnell*, 724 F.3d at 569, 25 BLR at 2-371;⁵ *see*

² The American Rule provides that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts*, 135 S. Ct. at 2164 (internal quotation marks and citation omitted).

³ The *Baker Botts* Court stated that, in contrast to the language used in most fee-shifting statutes, the text of Section 330(a)(1), which refers to "reasonable compensation for actual, necessary services rendered," "neither specifically nor explicitly authorizes courts to shift the costs of adversarial litigation from one side to the other" 135 S. Ct. at 2165.

⁴ Section 28(a) of the Longshore Act states,

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is

U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 13 BLR 2-364 (1990); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 420 U.S. 240 (1975); *Day v. James Marine, Inc.*, 518 F.3d 411, 42 BRBS 15(CRT) (6th Cir. 2008). Liability for the claimant's "reasonable" attorney's fee in this case was shifted to the employer pursuant to Section 28(a) of the Longshore Act. See, e.g., *B & G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008); *Bethenergy Mines Inc. v. Director, OWCP*, 854 F.2d 632 (3d Cir. 1988). A "reasonable" attorney's fee under a fee-shifting statute generally is determined by the "lodestar method," see *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), and "case law construing what is a 'reasonable' fee applies uniformly to all" fee-shifting statutes, *Dague*, 505 U.S. at 562. The fee for which the employer is liable may include a reasonable fee for the defense of counsel's fee petition. *Zeigler Coal Co. v. Director, OWCP*, 326 F.3d 894 (7th Cir. 2003); see also *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156

no liability for compensation within the provisions of this chapter *and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded*, in addition to the award of compensation, in a compensation order, *a reasonable attorney's fee against the employer or carrier* in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

33 U.S.C. §928(a) (emphasis added); see *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 13 BLR 2-364 (1990).

⁵ In *Gosnell*, the United States Court of Appeals for the Fourth Circuit stated,

Although litigants generally must pay their own attorneys' fees in the absence of explicit statutory authorization, *Key Tronic Corp. v. United States*, 511 U.S. 809, 814–15, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), Congress has provided a fee-shifting mechanism for use in black lung cases. Counsel for a successful black lung claimant is entitled to an award of attorneys' fees under the BLBA, 30 U.S.C. § 932(a), which incorporates by reference Section 28 of the Longshore and Harbor Workers' Compensation Act (the LHWCA), 33 U.S.C. § 928. An award of attorneys' fees is "mandatory" in such cases, *Day v. James Marine, Inc.*, 518 F.3d 411, 414 (6th Cir. 2008),

Gosnell, 724 F.3d at 569, 25 BLR at 2-371.

(2009) (disallowing excessive time for defending fee petition); *see also Comm'r, I.N.S. v. Jean*, 496 U.S. 154 (1990).

The decision in *Baker Botts* clearly distinguishes Section 330(a)(1) of the Bankruptcy Code from statutes that explicitly provide for fee-shifting, such as the Longshore Act. *Baker Botts*, 135 S.Ct. at 2165. Its application to other fee-shifting statutes also has been rejected.⁶ Moreover, the limited nature of the *Baker Botts* holding has been recognized thusly: “*Baker Botts* is binding only for the proposition that § 330(a)(1) of the Bankruptcy Code does not permit a bankruptcy court to award attorney’s fees for work performed in defending a fee application in court.” *Shammas v. Lee*, No. 1:12-cv-1462, 2016 WL 2726639 at * 4 (E.D. Va. May 9, 2016).

Based on the foregoing, we hold that *Baker Botts* is not applicable to Section 28(a) of the Longshore Act because it is a fee-shifting provision that abrogates the American Rule to the extent that the statutory requirements are satisfied, as in this case. Therefore, we reject employer’s contention that *Baker Botts* precludes its liability for claimant’s counsel’s fee for defending his fee petition. As employer’s motion for reconsideration does not challenge the reasonableness of the fee awarded by the Board to counsel for the defense of his fee petition, the Board’s September 30, 2015 Order is affirmed.

⁶ *See Romeo v. Simm Associates, Inc.*, ___ F.Supp. 3d ___, No. 3:15-cv-2136, 2016 WL 1070827 (M.D. Pa. Mar. 16, 2016) (not applicable to fee under Fair Debt Collection Practices Act, 15 U.S.C. §1692 et. seq.); *Wellman v. Colvin*, No. Civ. 13-1122 (D. N.M. June 15, 2015) (not applicable to fee under Equal Access to Justice Act, 28 U.S.C. §2412(d)(1)(A)). *Contra ACLF of Delaware v. Dep’t of Correction*, Civ. No. 09-179, 2016 WL 690891 (D. Del. Feb. 19, 2016) (fee defense not compensable under the Civil Rights Act, 42 U.S.C. §1988(b)). We note that the case cited by employer in its reply brief as support for its position, *Western Falcon, Inc. v. Moore Rod & Pipe, LLC*, Civ. Act. No. H-13-2963, 2015 WL 3823629 (S.D. Tex. June 18, 2015), does not apply *Baker Botts*. Rather, the plaintiff’s liability for the defendant’s attorney’s fee was rejected because the case was not “exceptional” such that liability for the attorney’s fee could be shifted to the other party, pursuant to 35 U.S.C. §285, which provides that “[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party.”

Accordingly, employer's motion for reconsideration en banc is denied. The Board's September 30, 2015 Order is affirmed. 20 C.F.R. §§801.301(c), 802.407(d), 802.409.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge